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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/706,420	11/12/2003	Robert Murray	40002-12017	6802
47050	7590	12/21/2005	EXAMINER	
RYNDAK & SURI LLP 200 W MADISON STREET SUITE 2100 CHICAGO, IL 60602			PRATT, HELEN F	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 12/21/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/706,420

Applicant(s)

MURRAY ET AL.

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-184 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-184 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____.
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: ____.

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claims 3, 16, 27, 29, 36, 49, 51, 99, 100 recite the broad recitation "trioses" and the claim also recites "such as pyruvate and lactate" which is the narrower statement of the range/limitation.

Also on line three the broad recitation "carbohydrates" is followed by the more narrow terms, "sucrose, maltose," etc.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-184 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fregly et al. (4,981,687) in view of Stray Gunderson (5,114,723, B2 reference of Ostuka, Bradley et al. (British 1, 252,781) and Ostuka (05-27904) and Robergs et al. (6,485,764).

Fregly discloses a beverage composition containing carbohydrate (sugar as in claim 2) in amounts of from 2-8%, 15-30 meg/l of sodium, and 1-5 meg of potassium and citrate, preservative and flavorings and water. The osmolality is from 300 to 350 (col. 4, lines 50-70, col. 8, lines 40-70, col. 9, lines 20-26). Other references, which contain varying amounts of ingredients, are Stray -Gunderson who discloses a composition containing the claimed electrolytes except that the sodium is used in lesser amounts (col. 18, lines 60-70).

Reference B2 to Otsuka discloses the use of from 47.5 to 52 meg/l of sodium and 47.5 of chloride (applicants' IDS).

Greenleaf also discloses that applicants particular osmolality of 270 is known as is the use of salt, sodium citrate and aspartame in a beverage for restoration of body fluids (abstract and col. 5, lines 28-35).

Otsuka (0527904) discloses the use of 15-50 meg/l of KCl.

Fischer '972 discloses the use of K, Na, Mg and Ca in a beverage with sugar and sodium citrate. The sugar is used in amounts of 1-14% (abstract and page 2, lines 45-60).

Bradley discloses the use of the claimed amounts of electrolytes as to sodium and chloride, but less potassium (page 8, lines 22-30). The above reference differs in the particular amounts of electrolytes. However, applicants' specification discloses that both sodium and potassium can be substituted for each other (0009). The particular osmolality has been disclosed as known by Fregly.

Claim 1 in particular differs from the reference to Fregly in the particular amounts of chloride. However, Robergs et al. disclose that it is known to use from 5-8 meg/l of potassium (abstract and col. 2, lines 16-25). Therefore, it would have been obvious to use the amount of potassium in the composition of Fregly for its known function and it would have been obvious to use the various known amounts of ingredients as disclosed by the other references to make the claimed product.

Claims 4-6 further require sodium in the range of from 30-100 meg/l and claims 7-10 other amounts. However, nothing new is seen in the use of high amounts of sodium as sodium is known to be lost from the body during dehydration or exercise. Applicants' specification discloses that it was known to use 40 – 100 meq to improve rehydration (0006, 0007). As above Na and K are interchangeable. Also, Otsuka '904 discloses the use of 15 –50 meq. Therefore, it would have been obvious to use more sodium in the composition of Fregly depending on the extent of rehydration required.

Claim 11 further requires from 1-6 meq of calcium and claim 12 1-6 meq of magnesium. Fischer discloses the use of a sports drink including these minerals (abstract). Therefore, it would have been obvious to use known mineral in small amounts for their known function.

Nothing new is seen in the use of flavoring and clouding agents as in claims 13 and 14 because they are commonly used in the beverage art. Therefore, it would have been obvious to use known ingredients in the claimed beverage.

Claims 15-35 further require particular amounts of ingredients. However, as each reference discloses various amounts of ingredients with known functions, it would have been obvious to use particular amounts depending on the body's depletion of such minerals.

The limitations of claims 36-48 have been disclosed above and are obvious for those reasons.

Claims 50-92 further require particular amounts of ions to fill the extra cellular fluid compartment. Applicants' specification discloses that the electrolytes are sodium and chloride (page 4, 0008). The use of sodium has been disclosed above by Otsuka '904. The further limitations of claims 50-92 have been disclosed above and are obvious for those reasons.

Claim 93 further requires that the composition is a concentrate that when reconstituted with a liquid provides the claimed concentration of ingredients. Fischer '972 discloses that concentrated sports drinks are known (page 10, lines 6-15). Therefore, it would have been obvious to concentrate beverage as shown by Fischer in

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the composition of the combined references. The limitations of claims 93-168 have been disclosed above and are obvious for those reasons.

Claims 169-184 are to the method of reducing the effects of dehydration, improving fluid retention and abating urinary loss and to administering the claimed composition to a person. All the references cited above are administered to people for the known function of rehydration. Sodium is well known to affect fluid retention as in bloating when one has too much salt. Abating urinary loss is seen to have been shown as sodium promotes water retention. Also, the claimed electrolytes are well known as shown by the above references. Therefore, it would have been obvious to use the claimed composition as found in the references for its known function of abating urinary loss, and the other functions as cited above. The further limitations of the claims have been disclosed above and are obvious for those reasons.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only.


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Hp 12-16-05


HELEN PRATT
PRIMARY EXAMINER